World Trade Review (2009), 8: 1, 31–44 Printed in the United Kingdom
 doi:10.1017/S1474745608004242

Nothing Dramatic (... regarding administration of customs laws)

A Comment on the WTO Appellate Body Report
EC – Selected Customs Matters

BERNARD M. HOEKMAN*
World Bank and CEPR
PETROS C. MAVROIDIS*
Columbia University, University of Neuchâtel and CEPR

Abstract: This paper discusses the 2005 dispute between the European Community (EC) and the United States (US) regarding the customs classification of two specific products and the ambit of Art. X GATT (Publication and Administration of Trade Regulations). The Dispute Settlement Panel and the Appellate Body (AB) essentially upheld the position advocated by the EC, with one exception that is of no practical import, as the EC had already modified its regime. While the AB followed prior case law, it added two new findings. First, the WTO-consistency of laws can be challenged under Art. X GATT if they concern the implementation or application of laws concerning customs administration and enforcement. Second, the obligation included in Art. X.3(b) GATT to establish tribunals or procedures to review and correct administrative actions relating to customs matters concerns courts of first instance only. Thus it is quite possible that their decisions might not be uniform, and absence of uniformity at this level is not a violation of Art. X.3(b).

1. Introduction

On 21 September 2004, the United States (US) requested consultations with the European Communities (EC) concerning its administration of laws and regulations pertaining to the classification and valuation of products for customs purposes. In a nutshell, the dispute revolved around differences in tariff classification across EC member states of identical products, in particular blackout drapery lining and LCD flat monitors with a digital video interface, and a lack of uniformity of EC tribunals and procedures in the review and correction of

* We are grateful to Bill Davey, David Palmeter, Joost Pauwelyn, Tom Prusa, Frieder Roessler, Joel Trachtman, Edwin Vermulst, and Joseph Weiler for sharing their views on this case with us, and commenting on a previous draft. The views expressed are personal and should not be attributed to the World Bank.

administrative action on customs matters. The Panel Report was circulated in June 2006, the Appellate Body (AB) report in November 2006.[1] The Panel found that the specific EC tariff classification measures ran afoul of Art. X.3 GATT, but the US government was less successful in challenging the behaviour of EC administrative courts entrusted with the enforcement of matters falling under the purview of Art. X GATT. In particular, the Panel disagreed with the US government's claim that all agencies should be bound by the decisions of the first-instance courts covered by Art. X.3(b) GATT.

This is one of the rare WTO disputes that concern the interpretation of Art. X GATT.[2] As indicated by its title, Art. X deals with the publication and administration of trade regulations.[3] Art. X comprises a general transparency obligation (X.1 GATT) with respect to all laws, regulations, judicial decisions, and administrative rulings of *general* application affecting trade, requiring that these be published. It also imposes specific obligations on governments to administer in a uniform, impartial, and reasonable manner all laws, regulations, decisions, and rulings pertaining to trade (including customs classification) (Art. X.3(a)) and to maintain or institute judicial, arbitral, or administrative tribunals or procedures through which the administration of customs laws and related matters can be reviewed (Art. X.3(b)). The provisions of Art. X.3 GATT formed the subject of this dispute.

In this paper, we discuss four dimensions of the case. Two of these are of more general character: the scope of Art. X.3(a) and the role of domestic courts under Art. X.3(b); two are specific, relating to tariff classification:

1. The United States appeals a Panel finding that the scope of Art. X.3(a) GATT is such that it cannot entertain any claims that go beyond issues regarding the application of laws and regulations. In line with this understanding, the Panel refused to find, as the United States had requested, that the EC was in violation of its obligation under Art. X.3(a) GATT in light of the divergent penalty provisions and audit procedures that were in force in various EC member states.
2. The US appeals a Panel finding that Art. X.3(b) GATT does not require that decisions of the judicial, arbitral, or administrative tribunals, or procedures for the review and correction of administrative action relating to customs matters, must govern the practice of all the agencies entrusted with administrative enforcement throughout the territory of a particular WTO Member.
3. The EC appeals a Panel finding that divergent classification decisions of blackout drapery lining by, on the one hand, German authorities and, on the other, the customs authorities in Belgium, Ireland, the Netherlands, and the United Kingdom,

1 *European Communities – Selected Customs Matters*, DS315 (WTO, 2006a, b).

2 It is the invocation of Art. X that makes this case distinct, as there is already a long history of disputes under the WTO between the EC and the US on tariff classification and related customs matters, starting with the 1996 *LAN Equipment* case (WT/DS/62).

3 Article X GATT is reproduced in the Annex to this paper.

imply non-uniform administration of laws and thus constitute a violation of Art. X.3(a) GATT.

4. The EC appeals a similar finding by the Panel that divergent tariff classification of LCD flat monitors results in a non-uniform administration of laws and thus a violation of Art. X.3(a) GATT.

The next section of this paper presents the response of the AB to each of these appeals. This is followed by a critical evaluation of the AB report and a discussion of the (limited) economic dimensions of this case and the reasoning of the AB.

2. The AB's response to the appeals

The AB rejected all but one of the four claims [item (3) above]. In doing so, it confirmed, albeit with modified reasoning, the Panel's findings.

2.1 The scope of Art. X.3(a) GATT

2.1.1 The claim and the legal framework

Art. X.3(a) GATT requires that WTO Members administer all laws, regulations, rulings, and decisions of the kind described in Art. X.1 GATT in a uniform, impartial and reasonable manner. The coverage of Art. X.1 GATT extends to laws, regulations, decisions, or rulings of general application. The question before the AB was whether the Panel had erred in finding that the observed divergence across different EC member states in penalty provisions and audit procedures did not run afoul of Art. X.3(a) GATT.

2.1.2 The AB's response

To respond to this question, the AB had to first satisfy itself that the challenged penalty provisions and audit procedures are laws, regulations, decisions, or rulings in the sense of Art. X.3(a) GATT. With respect to penalty provisions, there is no common EC law that is applicable throughout the EU. The EC lawyers testified before the AB that, in the absence of EC competence to this effect, member states are free to set the level of penalties, and that they are bound only by common principles that oblige them to ensure that penalties will be effective, proportionate, and dissuasive. Conversely, with respect to audit procedures, there is an EC statute, the *Community Customs Audit Guide*, that binds all member states but leaves some discretion to the customs authorities of the member states entrusted with its application (§208, AB Report).

The AB held the view that both the member-state statutes regarding penalty provisions, as well as the *Community Customs Audit Guide*, fall under the purview of Art. X.3(a) GATT. In so doing, it distanced itself from the Panel's analysis in this context. The AB relied, as did the Panel, on prior case law, according to which Art. X.3(a) GATT deals only with the administration of laws and not with their substantive conformity with the GATT. For example, a WTO Member that believes a law coming under the purview of Art. X.3(a) GATT is discriminatory

should invoke Art. I GATT, and not Art. X.3(a). In the AB's view, however, this does not mean that laws regulating the administration of specific legal instruments do not come under the purview of Art. X.3(a) GATT. The AB therefore makes a distinction between legal instruments regulating a specific customs transaction and legal instruments regulating the manner in which such legal instruments operate (when applied to specific customs transactions). In the words of the AB (§200, WTO, 2006b):

> While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a), if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of the legal instrument.

Thus the AB held the view that both the statutes concerning penalty provisions, as well as the *Community Customs Audit Guide*, were instruments regulating the application and implementation of specific instruments and, consequently, came under the purview of Art. X.3(a) GATT.

Having established the applicability of Art. X.3(a) GATT, the AB turned to whether the US had established a violation of Art. X.3(a) GATT. It held that this was not the case. In its view, the plaintiff should have provided evidence concerning the degree of difference in the level of the penalty provisions that were imposed, including evidence on the impact of such differences. The US did not do this, relying instead on a sentence in an EC Commission document ('An explanatory introduction to the modernized Customs Code') stating that specific offences may be considered a serious criminal act in one member state, whereas they may lead to a small or even to no penalty in another. In the AB's view, such differences need not be a reflection of penalty provisions; they might stem from the exercise of discretion in the application of law (§213, WTO, 2006b). Hence, the AB concluded that the US did not satisfy its burden of proof, since it did not establish that the mere existence of differences in penalty provisions, in and of themselves, led to non-uniform administration of EC customs laws.[4]

The AB reached a similar conclusion with respect to audit procedures. The US pointed to a provision in the *Community Customs Code* (Art. 78.2), which empowers customs authorities to conduct audits but does not oblige them to do so. In the AB's view, uncertainty as to when and if an audit will be carried out is in the interest of sound customs administration. As a result, the AB concluded that the US had failed to show why differences in audit procedures *necessarily* led to a demonstration of non-uniform administration (§216, WTO, 2006b). Given the absence of concrete examples, the US did not meet its burden of proof and, as a result, its claim was rejected.

4 The US legal strategy could be summarized as a mix of broad legal challenges on the consistency of EC legal instruments with the GATT, coupled with specific challenges regarding individual products.

2.2 *The role of domestic courts under Art. X.3b GATT*

2.2.1 *The claim and the legal framework*

The US appeals a Panel finding that WTO Members need not, by virtue of the obligation included in Art. X.3(b) GATT, establish courts that will have the authority to bind *all* agencies entrusted with administrative enforcement throughout the territory of a WTO Member. In the Panel's view, the courts referred to in this provision are first-instance courts. As such, it is reasonable that, in some national jurisdictions, they might have been assigned a specific territorial scope.

The US appeals this finding using predominantly textual arguments. In its view, the Panel did not pay attention to the term *agencies* appearing in Art. X.3(b) GATT, which, unless understood to cover all administrative agencies throughout the territory of one WTO Member, cannot guarantee uniform application of laws as required by this provision.

2.2.2 *The AB's response*

The AB dismisses the US argument in only one paragraph (§297, WTO, 2006b), essentially reproducing the Panel's analysis. It then opts for overkill with a number of paragraphs that do not add anything substantial to the original finding. In a nutshell, Art. X GATT is an obligation imposed on preexisting regulatory diversity. It covers courts of first instance. In many WTO Members, courts of first instance have a defined territorial scope. Thus, it is normal that their decisions bind only those agencies operating within their territorial scope. Uniformity will be achieved, if at all, at a higher judicial level (since such decisions can be appealed).

2.3 *The tariff classification of blackout drapery lining*

2.3.1 *The claim and the legal framework*

The Panel's finding concerning the tariff classification of blackout drapery lining (BDL) was predicated on a prior finding that the administrative process ultimately leading to the tariff classification comes under the purview of the term *administer* in Art. X.3(a) GATT. What was objectionable in the Panel's view was not the *outcome* itself (the tariff classification), but the *process* that could lead to GATT-inconsistent outcomes.

The process was as follows: the German customs authorities relied, for the purposes of tariff classification of BDL, on an *Interpretative Aid* particular to the German authorities. They also did not rely on decisions of other EC customs authorities regarding the tariff classification of BDL. This practice could lead to non-uniform application of customs laws and thus run afoul of Art. X.3(a) GATT (§230, WTO, 2006b). However, this was not the outcome in this specific case (§231). Consequently, what the Panel actually condemned was the potential for violation and not an observed violation of Art. X.3(a) GATT.

The EC appealed this finding on three counts: (i) the decision concerned an expired measure (§232, WTO, 2006b); (ii) there was no explicit reference in the

decision of the German customs authorities to the *Interpretative Aid* that had allegedly been used (§233); and (iii) the Panel ignored a letter by the German customs authorities (Hamburg Main Customs Office) to the effect that it did take into account the practice and decisions of other EC customs authorities (§233).

2.3.2 *The AB's response*

The AB overturned the Panel's finding. To do this, it first established that the administrative process leading to an outcome does indeed come under the purview of Art. X.3(a) GATT (§227, WTO, 2006b). It then applied a different standard of review than that used by the Panel: for a violation of Art. X.3(a) GATT to occur in the eyes of the AB, the Panel should have shown that the differential administrative process *necessarily* leads to non-uniform administration of customs laws. Absent such a demonstration, no violation of Art. X.3(a) GATT can be established (§§238–9). The Panel did not do this. Indeed, the Panel could not have done so, since, as explained above, the outcome (tariff classification) actually was uniform across the EC member states (§242).

The EC had further submitted a claim that the Panel, for the reasons mentioned in its appeal, violated its duty under Art. 11 DSU to undertake an objective assessment. The AB did not entertain this claim, deciding that it was not necessary to do so for the purposes of resolving this dispute (§243).

2.4 *The tariff classification of LCD flat monitors*

2.4.1 *The claim and the legal framework*

With respect to the tariff classification of LCD flat monitors with a digital video interface (hereinafter LCD), the situation was as follows: video monitors are classified under tariff heading 8528 and pay a 14 % import duty in the EC market, whereas computer monitors are classified under tariff heading 8471 and pay 0 % import duty. The Netherlands classifies LCD under 8528, whereas other EC member states do so under 8471. As a result, there is discrepancy as to the import duty that LCD exported to the EC market are subjected to, depending whether the destination is the Netherlands or another EC member state. The Panel had originally found that this discrepancy amounted to non-uniform application and, consequently, violated Art. X.3(a) GATT.

The EC appeals this finding. The EC does not contest that divergence indeed existed across the various member states. It argues, however, that it has taken action since 2004 to address this phenomenon (§246, WTO, 2006b). The EC submits that the adoption of EC Reg. 2171/2005, combined with the withdrawal of the Dutch measure (classifying LCD under 8528), are two measures that amply demonstrate that it did address the discrepancy. The Panel had refused to take such evidence into account because it was submitted belatedly, that is, after the interim review stage. The EC believes that the Panel's handling of this evidence was DSU inconsistent, since the evidence submitted related directly to the interim report that had been circulated to the parties to the dispute (§248). Moreover, the EC asserted

that the Panel violated its duty under Art. 11 DSU to make an objective assessment, since it took into account actions (the classification of LCD by the Dutch authorities) that post-dated its establishment (§249).

2.4.2 The AB's response

The AB was confronted with two questions:

(a) Can the Panel rely on evidence that post-dates its establishment?
(b) Was the Panel's decision not to take into account the evidence submitted by the EC at the interim review stage correct?

The AB answered the first question affirmatively. In its view, the Panel could legitimately rely on data that post-dates its establishment in order to understand how a measure that was in place when the Panel was established was being administered. The AB found support for this conclusion in the fact that the EC did not point to any evidence predating the Panel's establishment that could contradict the evidence on which the Panel relied (§254, WTO, 2006b).

The AB responded affirmatively to the second question as well. In prior case law, the AB had established that evidence submitted for the first time at the interim review stage is legitimately ignored (§259).

In light of its responses, the AB unsurprisingly rejected the EC claim that the AB had violated its duty under Art. 11 DSU. Moreover, the Panel did discuss the draft (at the interim review stage) regulation that would address the discrepancy observed with respect to the classification of LCD. It might not have paid it the attention that the EC would have wished, but this is not a reason, as *per* prior case law, to find that the Panel violated its obligations under Art. 11 DSU (§258).

3. A critical evaluation of the AB response

3.1 The scope of Art. X.3(a) GATT

It is hard to disagree with the AB regarding the scope of Art. X.3(a). The US did not even invoke the much-troubled mandatory/discretionary legislation case law on this question. It relied on just one sentence to support its claim that administration of laws by the authorities of EC member states is not uniform. As the US did not challenge a particular measure, but instead focused on the overall EC regulatory framework, it should have shown why this framework necessarily leads to violations. Exercise of discretion might or might not lead to violation; discretionary action must be judged by its outcome. The US, in other words, failed the appropriate standard of review.

The AB's reasoning can also be supported on economic grounds – the effects of non-uniformity are what matters. That said, from an economic perspective it is not clear why an importing government would permit non-uniformity in the first place. Assuming a unitary state and taking as given the objectives of the central government, external trade policies should be enforced uniformly at the border, independent of the specific frontier crossing used by a trader. Presumably, the

government has strong incentives to enforce the application of its trade policies in a uniform manner, as otherwise there will be loss of revenue (if the good is subject to tariffs) or non-achievement of the underlying objective (e.g., public health or safety).

As far as exporters/traders are concerned, two possibilities arise in any situation of *de facto* non-uniformity in the application of external trade regulations. One possibility is that the divergence implies lower trade costs in some location(s): for given transport and handling costs, traders may be able to benefit from differential application of trade regulations by shipping the product to the entry point that offers lower overall regulatory costs. In the case at hand (differential classification of an identical product at different entry points), traders would have a strong incentive to use the port/entry point where the applied trade regulation (e.g., classification) results in the lowest (tariff) burden. In this case it is not clear that traders (exporters) have an incentive to invoke Art. X – they are potentially better off as a result of non-uniformity, and at worst will be unaffected. But the main point is that it is not clear why a government would allow this situation to arise in the first place.

The second possibility is that the differential application of trade regulations results in some entry points/customs authorities imposing higher trade costs than what is intended by the government or permitted by the WTO – e.g., exceeding the tariff binding for a product or otherwise violating a WTO commitment. Presumably if this occurs there will again be an arbitrage incentive and products will be diverted to the lower-cost entry points. Of course, this will entail transactions costs. If these are high enough, it may be worthwhile to deal with the matter by bringing a case arguing that the importer is violating its tariff binding or other WTO disciplines. If so, one would not expect invocation of Art X – there are better (more direct) remedies available.

In practice, the type of non-uniformity that was of concern to the US is more likely to be specific to federal states and to customs unions. In the latter – the case at hand – member states may well have incentives to diverge from the common external trade policy. Their ability to do so will depend on the strength of the union, as reflected in the extent of delegation of powers to cooperative/joint institutions and their ability to enforce their competencies. In the case of the EU – the most far-reaching 'serious' customs union extant (and, indeed, much more than a customs union) – there is clearly a presumption that member states will apply the agreed common external trade policy. In practice, for a variety of reasons they may not end up doing so, but the Commission (and the majority of members) presumably has strong incentives to ensure uniformity in the application of the jointly agreed trade policy (as otherwise members can compete by offering lower customs duties to attract traffic through their ports, and, more generally, unwind the overall bargain that was struck in deciding the structure of the common external tariff). In the case that is the subject of this paper, the Commission acted even before the Panel had reached a finding, suggesting that the incentives of the EU and the US

were very much aligned: both want to see uniformity in the application of trade regulations.

This reasoning applies to both of the hypothetical situations discussed in the previous paragraphs as well as to a situation where the concern relates to the *uncertainty* created as the result of non-uniformity, i.e. where application of a policy varies across time and locations. If there are fixed costs of switching (e.g., location-specific investments have been made in a port of entry) or the transport and transactions costs associated with using alternative ports are high, traders can be negatively affected by non-uniform application of trade regulations. Insofar as there is not a clear policy intent reflected in the stable application of a given measure, invoking a provision such as Art. X may be the only practical recourse available to an exporter. Note that the incentives of the exporters and the government (in this case the Commission) are still aligned.[5]

An obvious question – to which we have no compelling answer – is why the US did not invoke Art. XXIV:8, which requires that substantially the same duties and other regulations of commerce be applied by each member of a customs union, or Art. XXIV:12, which calls upon each WTO Member to take such reasonable measures as may be available to it to ensure observance of the provisions of the GATT by the regional and local governments and authorities within its territory.[6] If the US truly perceived the matters that were raised in this case as constituting differential application of trade regulations, then these are the WTO provisions that would appear to address the problem directly. Aside from the standard hypothesis of the 'glass house' syndrome – worries about precedent-setting and possible 'retaliation' – it is difficult to understand why these provisions were not invoked.

3.2 *The role of domestic courts under Art. X.3(b) GATT*

Regarding the review of administration of trade regulations, it is also difficult to disagree with the AB. It is quite evident from the text of Art. X.3(b) that it applies to first-instance courts. The purpose of Art. X.3(b) is to guarantee that actions by agencies entrusted with enforcement of customs laws will be scrutinized by domestic review bodies. The quest for uniform application of laws – that is, the

5 An Art. X case may also be the only recourse if the underlying reason for non-uniform application of a policy is corruption and rent-seeking behaviour by parts of the government. Although clearly not an issue in the case at hand, this type of situation is worth mentioning for completeness. In principle, if government officials are corrupt, their behaviour will result in non-uniformity of application of trade policy, and the incentives of the government and exporters/trading partners will no longer be aligned.

6 Erskine (2006) asks the same question. He argues that the difference in language between Art. XXIV.8(a)(ii) and Art. X.3 GATT is an issue and proposes that the discrepancy be eliminated through legislative action. He also recommends that the EC and the US sign an agreement to harmonize tariff classification so as to avoid similar disputes in the future. It is unclear why the latter proposal would address the issues arising in this case. However, in general, a move by a country to a uniform tariff structure will make tariff classification issues a thing of the past, as well as generate a variety of other benefits – see Tarr (2002).

overarching objective – does not end with such courts. Appeals may be launched against decisions taken, and it is only at this stage that a higher degree of uniformity should be requested. Even then, some heterogeneity might still persist and be permitted.[7] It is not unheard of, for example, that different courts of appeal might vary in their view of a particular transaction. The US, the appellant in this case, should be quite familiar with this concept: its various federal courts do not see eye to eye on all matters. Appropriately, the Panel and the AB both opted for relative uniformity, not absolute identity.

There are some important contextual arguments that the AB could have used that would help cement this approach: Art. XXIV:12 GATT introduces a *reasonableness* test, according to which central governments should do what is within their constitutional powers in order to secure an outcome at a lower level of government. In this vein, federal states might be obliged to tolerate some divergence by state courts in the context of Art. X.3(b) GATT.

3.3 The claims regarding tariff classification

There is nothing much to say about BDL. There are, however, three legal questions that can be raised regarding the AB determinations on the classification of LCD:

1. Recall that the EC claimed that the Panel had no evidence before it to find that the LCD classification was GATT-inconsistent, and that it relied on evidence that post-dated its establishment. The AB did not agree with the EC, holding that the evidence before the Panel was enough. The evidence before the Panel, however, was quite shaky: it consisted of two EC regulations that had been amended before the Panel finished its work, an opinion of the Customs Code Committee, official notices by two national customs authorities, and letters from EC officials. The first two documents had been superseded by the time the Panel issued its findings. It is rather odd that the AB found that the other documents constituted sufficient evidence: had it applied the same standard throughout the claims presented in this dispute, it would have probably found that the EC misclassified BDL as well. After all, it is the same AB which held that some divergence is not, in and of itself, grounds for finding that Art. X.3(a) GATT has been violated. Why is some divergence in BDL different from some divergence in LCD? Crucially, the Panel does not explain anywhere what in the LCD practice necessarily leads to non-uniform application, the criterion the AB established when dealing with the claim regarding the classification of BDL.
2. Moreover, the EC appealed the Panel's finding on the basis that the Panel did not take into account submitted evidence (the new regulation). The AB responded that the Panel did take this into account; the fact that it did so without according it the weight that the EC thought was appropriate was not, in and of itself, adequate reason for the AB to find that the Panel had not observed its duty under Art. 11 DSU.

7 The literature on the GATT, with some minor variations, is unanimous on this; see, for example, Hudec (1990), Jackson (1969), or Matsushita *et al.* (2006).

This is a weak argument for rejecting the appeal. In the Panel Report, the evidence submitted by the EC is described as follows:

> The Panel notes the existence of a draft Regulation concerning the classification of LCD monitors contained in Exhibit EC-163. However, at the time the Panel issued its Interim Report to the parties, the Panel had not been provided with evidence to indicate that that draft regulation had the effect of removing divergence in tariff classification of such monitors which became evident in 2004. (§7.305, footnote 580, WTO 2006a).

What evidence was the Panel looking for? The EC presented the new regulation, which was enacted, as its preamble and text make clear, in order to amend the previous legislation in place. The Panel discusses none of the features of the new legislation at all. It makes an unsubstantiated assertion, and the AB takes the view that it suffices that the Panel mentioned that it had in its possession the new evidence. On this standard of review, there are dozens of Panel findings that never should have been overturned.

3. Finally, the EC argued that the Panel relied on evidence that post-dated its establishment. The AB sees nothing wrong with that, and adds that the EC did not submit any evidence to the contrary. This is probably awkward drafting by the AB; otherwise it is quite unintelligible, since the AB imposes a remarkable shift in the allocation of burden of proof: it is not for the EC to show that it is a good citizen; it is for the US to show that the EC is bad citizen. Probably what the AB had in mind was that the EC did not submit any information that would counteract what both the Panel and the AB considered *prima facie* evidence (discussed under (a) supra) that the EC had violated its obligations under Art. X.3(a) GATT.

The economics here are identical to those discussed regarding the non-uniformity of application of trade regulations – i.e., from an economic perspective, there is no difference between the issues (incentives) that are created by differences in classification across states in a customs union and non-uniform application of trade laws within a customs union.

4. Concluding remarks

The overall finding by the AB in this case is rather innocuous in terms of its implications for the EC, since the EC amended its laws before the Panel had completed its work (even though the Panel saw no evidence that this was indeed the case). We also observe nothing dramatic in this jurisprudence. The AB refined somewhat the scope of both Arts. X.3(a) and X.3(b) GATT: we now know that the WTO-consistency of laws can be challenged under Art. X GATT if the implementation or application of these laws concern customs administration and enforcement. We also know that the courts envisaged in Art. X.3(b) GATT are first-instance courts, and therefore their determinations might not be uniform and

do not necessarily bind all agencies throughout the territory of the WTO Member in which they are located. Absence of uniformity at the level of first-instance courts is not a violation of Art. X.3(b). The rest is an echo of prior case law.

It is quite surprising that the US did not invoke the mandatory-legislation case law. Its problems notwithstanding, this provides the only conceptual framework to discuss the consistency of a general measure as opposed to specific applications thereof. It is perhaps less surprising that the US did not invoke Art. XXIV GATT. Although in principle it appears to be directly applicable – as what was at issue was the differential application of the common external trade policy of a customs union, which would violate Art. XXIV:8 – the US may not have wanted to invoke Art. XXIV for fear of setting a precedent that would induce subsequent challenges to the WTO-consistency of its many free-trade agreements.[8]

Whatever the reasons for the (non-)invocation of Art. XXIV, it would be difficult to make a compelling case that the EC was intentionally applying differential tariffs. This may help to explain why Art. X was invoked (i.e., putting the emphasis on the effectiveness of the processes within the EU to address instances of non-uniformity). What does seem clear is that, in this specific dispute, the incentives confronting the EC Commission were very much aligned with the US – i.e., both favouring uniformity in the application of trade regulations – raising a more general question regarding the political economy forces that led to this case being brought by the US government in the first place. It would appear that, given the incentive structure confronting the Commission, simply bringing the matter to the attention of the EC would have sufficed – as in fact it appears to have done.

References

Erskine, Daniel H. (2006), 'The US–EC Dispute over Customs Matters: Trade Facilitation, Customs Unions, and the Meaning of WTO Obligations', *Florida Journal of International Law*, **18**: 424–484.

Hudec, Robert E. (1990), *The GATT Legal System and World Trade Diplomacy*, 2nd edn, Salem, MA: Butterworth.

Jackson, John H. (1969), *World Trade and the Law of the GATT*, Indianapolis, IA: Bobbs-Merril.

Matsushita, Mitsuo, Thomas J. Schonbaum, and Petros C. Mavroidis (2006), *The World Trade Organization: Law Practice, and Policy*, 2nd edn, Oxford: Oxford University Press.

Mavroidis, Petros C. (2006), 'If I don't do it somebody else will (or won't)', *Journal of World Trade*, **40**: 187–214.

Tarr, David G. (2002), 'On the Design of Tariff Policy: Arguments for and against Uniform Tariffs', in B. Hoekman, A. Mattoo, and P. English (eds.), *Development, Trade and the WTO: A Handbook*, Washington: World Bank.

WTO (2006a), *European Communities – Selected Customs Matters – Report of the Panel*, WT/DS315/R. Geneva: WTO.

WTO (2006b), *European Communities – Selected Customs Matters – Report of the Appellate Body*, WT/DS315/AB/R. Geneva: WTO.

8 For arguments to this effect, see Mavroidis (2006).

Annex

Art. X GATT

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
   (*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.
   (*c*) The provisions of subparagraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the

agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.